

Fordham Law Review

Volume 65 | Issue 2

Article 6

1996

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Deborah L. Rhode

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Recommended Citation

Deborah L. Rhode, *Response to Glass Ceilings and Open Doors: A Modest Proposal for Change*, 65 Fordham L. Rev. 585 (1996).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss2/6>

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Response to Glass Ceilings and Open Doors: A Modest Proposal for Change

Cover Page Footnote

Professor of Law, Director of the Keck Center on Legal Ethics and the Legal Profession. B.A. Yale University, 1974. J.D. Yale Law School, 1977. Ideas expressed in this essay appear in different form in Deborah L. Rhode, *Career Progress, Yes; Equality, Not Quite Yet*, Nat'l L.J., July 31, 1995, at A21, and *Women Haven't Arrived*; Nat'l L.J., Mar. 18, 1996, at A19, A20. The comments of Barbara Allen Babcock and Cynthia Fuchs Epstein, the research assistance of Betsy Facher and Sarah Killingsworth, and the financial support of the W.M. Keck Foundation is gratefully acknowledged.

MYTHS OF MERITOCRACY

Deborah L. Rhode*

INTRODUCTION

IN the fall of 1995, just as the Association of the Bar of the City of New York released its *Glass Ceilings and Open Doors* report,¹ its principal author and I attended the Association's 100th Anniversary Celebration. The event was impressive, and no evidence of the gender bias described throughout the report was in sight. Or so we thought as the program began. Principal speakers included United States Supreme Court Justice Ruth Bader Ginsberg, American Bar Association President Roberta Cooper Ramo, and New York City Bar Association President Barbara Robinson. First Lady Hillary Rodham Clinton and Chief Justice Judith Kaye of the New York Court of Appeals also addressed the Association on videotape. The preponderance of women in this lineup did not pass unnoticed, and not everyone viewed it as a sign of progress. "It's a goddamn matriarchy," a man near me muttered.

Of course, for well over two centuries, the gender roles at such events were reversed and almost no men thought it odd—or thought about it at all. Prominent Washington, D.C. practitioner Sol Linowitz recalls that his law school class had only two women. Neither he, nor most of his male classmates questioned the skewed ratio, although they did feel somewhat uncomfortable when their two female colleagues were around. And, as Linowitz now acknowledges with self-deprecating grace, "It never occurred to us to wonder whether *they* felt uncomfortable."²

Over the last quarter century, sensitivity to gender bias has increased dramatically, as has women's representation in the legal profession. But ironically enough, this partial progress has created its own obstacles to further reform. Women's growing opportunities are often taken as evidence that the "woman problem" has been solved. Recent surveys find that only one-quarter to one-third of men report

* Professor of Law, Director of the Keck Center on Legal Ethics and the Legal Profession. B.A. Yale University, 1974. J.D. Yale Law School, 1977. Ideas expressed in this essay appear in different form in Deborah L. Rhode, *Career Progress, Yes; Equality, Not Quite Yet*, Nat'l L.J., July 31, 1995, at A21, and *Women Haven't Arrived*, Nat'l L.J., Mar. 18, 1996, at A19, A20. The comments of Barbara Allen Babcock and Cynthia Fuchs Epstein, the research assistance of Betsy Facher and Sarah Killingsworth, and the financial support of the W.M. Keck Foundation is gratefully acknowledged.

1. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 Fordham L. Rev. 291 (1995) [hereinafter *Glass Ceilings*].

2. Sol M. Linowitz & Martin Mayer, *The Betrayed Profession* 6 (1994).

observing gender bias in the profession, although two-thirds to three-quarters of women indicate that they personally have experienced it.³ Even those men who perceive such bias often discount its significance. As one Texas practitioner put it, "[O]f all the problems we have as lawyers, gender discrimination [is] low on the list of important ones."⁴

To him, perhaps. But, the *Glass Ceilings* report, together with two other recent surveys, is unlikely to leave a similar impression. The American Bar Association's Commission on the Status of Women aptly titled its 1995 report, *Unfinished Business: Overcoming the Sisyphus Factor*.⁵ Similar findings appear in the Harvard Women's Law Association's study, *Presumed Equal: What America's Top Women Lawyers Really Think About Their Firms*.⁶ Taken together, these 400-odd pages offer a sobering account of progress yet to be made.

The three reports rely on quite different approaches, yet yield quite consistent findings. The New York study turned a meticulous scholar's eye on quantitative and qualitative data from eight Manhattan law firms. The ABA Commission reviewed many such studies, as well as written testimony and focus group responses. The Harvard Women's Law Association, equipped with less funding and expertise, did what students do best. It asked lawyers what their professional life was like, and collected responses from female attorneys at some 250 firms. The bottom line of this research, like virtually all other recent studies, is that all is not well for women in law.

Yet this is not the dominant perception of male attorneys. Rather, a common response to gender bias surveys is that barriers have broken down, women have moved up, and full equality is just around the corner. This myth of meritocracy rests on two dominant assumptions: (1) that female lawyers are already achieving close to proportionate representation in almost all professional contexts; and (2) that any lingering disparities are attributable to women's own "different" choices and capabilities.

I have written about these issues on other occasions and will not repeat that entire discussion here.⁷ Rather, I hope to take advantage of this opportunity to highlight the challenges that remain for a profession committed, at least in principle, to equal justice under law.

3. Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 Ind. L.J. 941, 971 (1991); Deborah L. Rhode, *Gender and Professional Roles*, 63 Fordham L. Rev. 39, 64-65 (1994).

4. Diane F. Norwood & Arlette Molina, *Sex Discrimination in the Profession: 1990 Survey Results Reported*, Tex. B.J., Jan. 1992, at 50, 51.

5. ABA Comm. on Women in the Profession, *Unfinished Business: Overcoming the Sisyphus Factor* (1995) [hereinafter *Unfinished Business*].

6. Harvard Women's Law Association, *Presumed Equal: What America's Top Women Lawyers Really Think About Their Firms* (1995) [hereinafter *Presumed Equal*].

7. See Deborah L. Rhode, *Speaking of Sex* (forthcoming 1997); Rhode, *supra* note 3; Deborah L. Rhode, *The 'No Problem' Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731 (1991).

I. MYTHS OF EQUAL OPPORTUNITY

A threshold problem for women in American law is the denial by many practitioners that there is a serious problem. As one male attorney explained to *Glass Ceilings* researchers, everyone "should just leave the situation to sort itself out because . . . women's advancement is only a matter of time. I think forcing the situation is not helpful."⁸ Yet these three reports make clear that if time alone is viewed as the answer, we are in for a very long wait.

ABA Commission findings indicate that women now account for about forty-five percent of law students and twenty-three percent of the bar, but only nineteen percent of tenured law school faculty, thirteen percent of law firm partners, ten to twelve percent of judges, and eight percent of law school deans.⁹ More finely tuned data reveal further sex-based disparities in positions of greatest power, security, and economic reward. For example, among law firm partners, only about half of female attorneys but three quarters of male attorneys have equity status.¹⁰ Although some forty percent of in-house corporate lawyers are women, only seventeen percent of surveyed companies have female attorneys heading their legal departments.¹¹

Such underrepresentation cannot be explained simply by disparities in the pool of eligible candidates. For example, the *Glass Ceilings* report finds that New York women's rate of becoming partner was five percent and men's seventeen percent during the most recent period under review.¹² Other studies also have found substantial gender-linked disparities in promotion and pay among lawyers with comparable positions, experience, and qualifications. So too, an ABA survey of some 3000 lawyers with similar backgrounds found that males were more than twice as likely as females to have achieved partnership status.¹³ In research reviewed by the ABA Commission, pay gaps range from ten to thirty-five percent among male and female general counsels.¹⁴

What limited data are available for women of color reveal even greater underrepresentation, particularly in positions with the highest

8. *Glass Ceilings*, *supra* note 1, at 356-57. Similar views dominated a male focus group at the 1995 American Bar Association Midyear Meeting, where the prevailing wisdom was that "special consideration" for women had "gone far enough." Nina Bernstein, *Equal Opportunity Recedes for Most Female Lawyers*, N.Y. Times, Jan. 8, 1996, at A7.

9. Unfinished Business, *supra* note 5, at 5, 7-8, 11, 16.

10: Chris Klein, *Women's Progress Slows at Top Firms*, Nat'l L.J., May 6, 1996, at 1, 19.

11. Susan Saltonstall Duncan, *What Women Need to Make It to the Top*, Am. Law., Jan./Feb. 1996, at 9.

12. *Glass Ceilings*, *supra* note 1, at 359.

13. American Bar Association Young Lawyers Division, *The State of the Legal Profession 1990*, at 63 (1991).

14. Unfinished Business, *supra* note 5, at 10.

salaries and status. These women account for less than three percent of lawyers and judges.¹⁵ Minority retention rates in law firms are especially poor and few women of color have obtained partnership.¹⁶

At least part of the reason for such underrepresentation involves lingering, although often unconscious, gender and racial biases. For example, female lawyers consistently report receiving fewer opportunities for mentoring, business development, and desirable assignments than their male colleagues. Those inequalities often reflect sex-based stereotypes, such as the assumption that women with children are less committed to their careers than are other attorneys. Mothers repeatedly told New York and Harvard researchers that they received less desirable assignments than they had received "BC" (before children). One Boston lawyer reported that "since I came back from maternity leave, I get the work of a paralegal . . . I want to say, 'look, I had a baby, not a lobotomy!'"¹⁷

Preconceptions about women's lesser commitment often distort performance evaluations and eventually become self fulfilling prophecies. As cognitive psychological research consistently demonstrates, individuals are most likely to retain information that confirms initial biases. As a consequence, they will tend to remember the times that mothers leave early, not the occasions where they stay late.¹⁸ So too, when supervising attorneys doubt that a woman will make the sacrifices necessary to become a partner, they frequently fail to provide her with the experience, support, and client contact that are essential to that achievement.

Other stereotypes, such as a perceived lower level of competence among women of color, have similar consequences. The limited information on racial bias available in the New York, American Bar Association, and Harvard studies is consistent with other research, such as the United States Department of Labor's *Glass Ceilings* survey, and the report of the Multicultural Women's Network of the American

15. ABA Comm. on Women in the Profession, *Women in the Law: A Look at the Numbers* 17 (1995).

16. Exact numbers are generally not available. For descriptions of the problem, see Presumed Equal, *supra* note 6, at 6; Multicultural Women Attorneys Network of the American Bar Association, *The Burdens of Both, the Privileges of Neither* (1994) [hereinafter Multicultural Women Attorneys Network].

17. Presumed Equal, *supra* note 6, at 72; see *Glass Ceilings*, *supra* note 1, at 298 (noting the perception on the part of women that having children impeded professional advancement).

18. For discussion of such stereotypes, see Deborah L. Rhode, *Justice and Gender* 168-70 (1989); Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995); Federal Glass Ceiling Commission, *Good For Business: Making Full Use of the Nation's Human Capital* 26-28, 64-72, 93-96, 104-06, 123-25 (1995) [hereinafter Federal Glass Ceiling Commission].

Bar Association.¹⁹ In one telling instance, an African American partner in a major Chicago law firm reported that she had been mistaken for a stenographer at every pretrial deposition that she had ever attended.²⁰

Among men who have not been on the receiving end of gender or racial bias, such incidents may appear relatively trivial and rarely memorable; they seem like isolated events, not representative illustrations of broader patterns. By contrast, men are far more likely to notice, recall, and resent bias against their own sex and invest these incidents with both personal and societal significance. Columbia law professor Patricia Williams describes a recent example. "Nobody's hiring white guys anymore," was the unchallenged wisdom of one participant at a meeting of commercial lawyers. Williams surveyed the room of several hundred attorneys. She spotted one other black woman, no black men, no Hispanics, about ten Asians, and a "modest sprinkling" of white women. "So who is being hired if not white guys?" she wonders. "And if white guys aren't being hired, what on earth makes them think anyone else is?"²¹

A related problem involves the reluctance that some male clients and attorneys still feel in working closely with women, or including them in informal networks where mentoring and rainmaking occur. As one participant in the Labor Department's *Glass Ceilings* study noted, "what's important [in organizations] is comfort, chemistry . . . and collaborations."²² Many white men "don't like the competition and they don't like the tension" of working with colleagues who are "different."²³

Concerns about sexual harassment complaints can heighten that discomfort. Some male partners refuse to lunch alone with a female associate "because of how it might be perceived."²⁴ As one attorney in the New York *Glass Ceilings* study explained:

There's definitely a siege mentality going on here about this gender stuff. . . . [I] will not have a female associate while I'm traveling. You're just asking for problems down the road. So you have a lack of mentoring in most firms . . . [y]ou can't bond as easily with a woman because you've got the whole issue of sexual harassment or whatever it is.²⁵

Although such concerns are often genuine, they are by no means the sole, or often the most significant source of the problem. Men who

19. Federal Glass Ceiling Commission, *supra* note 18, at 64-142; Multicultural Women Attorneys Network, *supra* note 16.

20. Multicultural Women Attorneys Network, *supra* note 16, at 26.

21. Patricia J. Williams, *The Rooster's Egg* 97 (1995).

22. Federal Glass Ceiling Commission, *supra* note 18, at 28.

23. *Id.* at 552; Judith Lorber, *Paradoxes of Gender* 237-38 (1994).

24. *Glass Ceilings*, *supra* note 1, at 356.

25. *Id.* at 355.

now invoke harassment as a reason to avoid mentoring women colleagues found ample other reasons to avoid it in the past.²⁶

Problems of exclusion are particularly acute for attorneys who labor under multiple disadvantages such as gender, race, ethnicity, disability, and sexual orientation. Many women of color report being treated as outsiders by white practitioners, and as potential competitors by nonwhite men.²⁷ Lesbians are routinely hazed, isolated, and denied professional opportunities. They, like Linowitz's classmates, often make others feel "uncomfortable" and this is viewed as *their*, and not their colleagues', problem.²⁸ Even in jurisdictions that prohibit discrimination on the basis of sexual preference, noncompliance is widespread and sometimes quite explicit. A recent bar association survey in Los Angeles, which bans discrimination against gays and lesbians, produced responses like "[D]on't have any; don't want any."²⁹ Almost forty percent of surveyed practitioners reported witnessing or experiencing discrimination based on sexual orientation.³⁰

White men are, of course, not the only group responsible for these patterns of prejudice; women can be perpetrators as well as targets of exclusion. As recent reports make clear, legal workplaces still have what sociologists once labeled "Queen Bees"—professionals who believe that *they* managed without special help, so why can't other women.³¹ Some senior women also lack the time or influence to provide effective assistance to younger colleagues. Others worry that they risk professional opportunities even for trying. The experience of one African American member of a glass ceiling audit team is all too common. After pointing out her own department's failure to abide by equal opportunity standards, she learned that her superiors viewed such candor as "poor judgment." Their message was, in effect,

26. For general discussion of longstanding barriers to women in law see Cynthia Fuchs Epstein, *Women and Law* (2d ed. 1993); Karen Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* (1986); Deborah L. Rhode, *Perspectives on Professional Women*, 40 Stan. L. Rev. 1163 (1988).

27. See David Rothman, *quoted in* Ninth Circuit Gender Bias Task Force, *Discussion Draft*, July 1992, at 171 (1992).

28. See Los Angeles County Bar Association Ad Hoc Committee on Sexual Orientation Bias, *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, reprinted in 4 S. Cal. Rev. L. & Women's Stud. 295, 444-49, 471 (1995).

29. *Id.* at 312.

30. *Id.* at 297.

31. See Ann Wilson Schaff, *Women's Realities* 44 (1981); see also *Glass Ceilings*, *supra* note 1, at 408 (noting that some older women consider their younger colleagues to be "naïve" in failing to "accept the fact that being a high powered lawyer is hard work and basically incompatible with a part-time schedule"); Presumed Equal, *supra* note 6, at 18-19 (quoting Baker & Botts associates who find that most female partners do not "care to relate to younger [women]" and are not receptive to accommodating family needs because these partners "sacrificed to get where they are" and believe others should do the same).

"[W]e're not really comfortable with what you're saying and we don't want [to work with] people who make us uncomfortable."³²

As a result of such patterns, women often remain outside of the informal networks of support that can be crucial for professional advancement. Pointing out this exclusion can compound the problem, which creates a classic double bind for female attorneys. When many vote with their feet, they confirm the perception that women simply do not make the same career choices as their male colleagues. This perception then encourages unequal treatment of women and perpetuates the stereotypes that underlie such treatment.

II. MYTHS OF CHOICE

Women's choices also figure prominently in a second common explanation for persistent gender inequalities. Many lawyers assume that women have different family priorities than men and that these personal commitments exact a professional price.

There is some truth to this view, but it provides neither a complete explanation nor an adequate justification for prevailing gender inequalities. As a descriptive matter, women's different "lifestyle" preferences cannot account for the extent of their underrepresentation in law firm partnerships or corporate counsel positions. Only about four percent of female associates have part-time or flexible schedules, and recent studies find substantial gender disparities among lawyers in similar full-time positions.³³

It is, of course, true that women express greater dissatisfaction with current workplace structures than men, and are disproportionately likely to opt out of positions with the greatest demands on time, travel, and unpredictable schedules. Yet such patterns are not simply a function of "natural" preferences. Women's career sacrifices are attributable not just to women's choices but to men's choices as well. Male spouses' failure to shoulder equal family responsibilities and male colleagues' failure to support alternative working arrangements are also responsible. Employed women spend about twice as much time on domestic chores as do employed men, and not always by choice.³⁴ Part of the problem is that female attorneys with significant family commitments tend to have partners, husbands, or former husbands with equally demanding careers. These men frequently view their own professional obligations as fixed and women's as negotiable.

32. *Greener Pastures, Perspectives* (ABA Comm. on the Status of Women), Summer 1995, at 3.

33. See *Unfinished Business*, *supra* note 5, at 17; *Part-Time Lawyering*, *Partner's Rep.*, Jan. 1996, at 11; *supra* notes 13-14.

34. Juliet B. Schor, *The Overworked American* 36-38 (1991); Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 *Am. Soc. Rev.* 337, 337 (1994); Colleen O'Connor, *Women, If You Think You Have No Time to Relax, You're Probably Right*, *San Jose Mercury News*, Aug. 8, 1994, at E1.

Rather than accept an equal division of household tasks, many husbands define their share as unnecessary; they do not mind living with a little mess, or adding to their infant's time among "friends" at day-care.³⁵ Divorced fathers often end up as "Disney Dads," who leave day-to-day childrearing obligations to stressed-out single moms.³⁶ Other men manage not to notice when their household tasks need to be done, or mismanage key parts of the job. To avoid a "culture of complaint" on family obligations, professional women often pick up the pieces that their partners do not even realize have been dropped.³⁷

The problem is not only that many men are reluctant to make career sacrifices, but also that those who attempt to do so encounter too much resistance. Colleagues who are reluctant to accommodate mothers often have even less tolerance for fathers. A common attitude among surveyed New York lawyers was, "I have a family. I didn't get time off to do that. Why should you?"³⁸ In one particularly striking instance of the puritan ethic run amok, litigators assigned a new father to work on an out-of-town trial two days after his wife gave birth, and gave him time for only one brief trip home during the next two weeks.³⁹

Ironically enough, managing attorneys sometimes invoke these refusals to accommodate male lawyers' family commitments as evidence that gender bias is not a problem in their workplaces. After all, women are more likely than men to receive "special" treatment concerning family leaves and reduced schedules. But that response misses a central part of the problem at issue. Discrimination against men with family commitments also discriminates against women. It discourages male attorneys from assuming an equal division of household responsibilities and requires their spouses or partners, who may also be lawyers, to pay a professional price. As long as work and family conflicts remain primarily "women's issues," they are unlikely to receive adequate attention in decision-making structures dominated by men.

The limits of current family-related policies emerge clearly in these recent reports. They describe, in deadening and depressing detail, the sweatshop hours expected of full-time attorneys, and the second-class

35. See Arlie Hochschild with Ann Machung, *The Second Shift: Working Parents and the Revolution at Home* 43 (1989); see also Barbara Vobejda, *Children Help Less at Home: Dads Do More*, Wash. Post, Nov. 24, 1991, at A1 (quoting demographer Martha Farnsworth Riche's observation that the "great lesson of the past 15 to 20 years is that men don't care if the house is clean and neat, by and large").

36. The phrase comes from Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 Rutgers L. Rev. 1141, 1178 (1991). See Karen Czapansky, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415, 1447-48 (1991); Tamar Lewin, *Father's Vanishing Act Called Common Drama*, N.Y. Times, June 4, 1990, at A18.

37. See Rhode, *supra* note 3; Hochschild, *supra* note 34, at 259; Vobjeda, *supra* note 35, at A1.

38. *Glass Ceilings*, *supra* note 1, at 409.

39. Presumed Equal, *supra* note 6, at 58.

status imposed on part-time practitioners. Women spoke of not seeing their children awake for a week; of leaving their social life on perpetual hold; of being trapped in the office until three a.m. over Christmas vacation faxing documents to a partner skiing in Aspen; of working full-time schedules while nominally on part-time status; of negotiating with a "very understanding" section head and being lucky enough to work only from six a.m. to six p.m.⁴⁰ As one female associate in the *Glass Ceilings* report summarized the situation: "This is not a life."⁴¹

A decade ago, at a Stanford symposium on the corporate law firm, I raised these issues before a distinguished group of managing partners. "Why don't more firms allow lawyers to meet family responsibilities by opting for saner schedules and lower salaries?" I asked. "Because," one senior partner explained impatiently, "flexible or reduced workloads cost money." Getting additional lawyers up to speed, adjusting to reduced schedules, and paying extra overhead are expensive. "And who," he concluded, "is going to pay for all that?" Summoning up all the naivete he obviously expected, I responded: "You will." At least in the short run. But in the long run, I noted, employers who provide opportunities for flexible hours generally find gains in efficiency, morale, recruitment, and retention.⁴² Moreover, given the salary levels available for most partners at major law firms, some short term financial sacrifice does not seem like an unreasonable request.

Putting an exact price tag on all the costs and benefits of workplace flexibility is obviously impossible, but growing evidence suggests that the investment makes economic sense. The inadequacy of time for family and personal needs is one of the leading causes of lawyers' exceptionally high rate of job dissatisfaction, stress, and related problems such as depression and substance abuse.⁴³ These take a toll on the bottom line. As the Harvard Women's guide notes, a signifi-

40. *Id.* at 68, 138-39, 160; *Glass Ceilings*, *supra* note 1, at 387-88, 391, 394, 399, 411.

41. *Glass Ceilings*, *supra* note 1, at 385.

42. See Schor, *supra* note 34; ABA Comm. on Women in the Profession, Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers, Part II (1990); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economic Diversification and Organization of Lawyering*, 44 Case W. Res. L. Rev. 621, 658-59 (1994).

43. For research on dissatisfaction and stress, see American Bar Association Young Lawyers Division, *supra* note 13, at 54 (reporting that 41% of women and 28% of men in private practice are dissatisfied); Andrew Herrmann, *Depressing News For Lawyers*, Chi. Sun Times, Sept. 13, 1991, at 1 (reporting survey findings that lawyers top the list of professionals likely to suffer major depression); Shelly Phillips, *Lawyers Who Want Out: Nearly Half Say They Would Change Jobs If They Felt There Was a Reasonable Alternative, A National Survey Finds*, Phila. Inquirer, June 8, 1993, at F1; Benjamin Sells, *Counsel on the Verge of a Nervous Breakdown*, S.F. Daily J., May 25, 1994, at 3A. For estimates suggesting that the percentage of lawyers with substance abuse problems is twice the national average, see Anne Fahy Morris, *'Justifiable Paranoia' Afflicts Lawyers, Psychologist Says*, L.A. Times, May 1, 1994, at A27.

cant number of large firms have managed to create "family friendly" policies without apparent financial sacrifice.⁴⁴ Even if there is some price to pay for gender equality, can the legal profession, which will soon be forty percent female, really not afford the cost? If we are truly committed to equal opportunity, then these recent reports remind us of the distance yet to be travelled.

44. Presumed Equal, *supra* note 6, at 7.